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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 257

HENRY J. JONES,

Petitioner,

vs.

LYKES BROS. STEAMSHIP CO., INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, an American seaman, prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered June 4, 1953, which reversed a judgment for plaintiff for damages for personal injuries and dismissed the complaint, and on June 19, 1953, denied plaintiff's petition for rehearing filed June 17, 1953.

Opinions Below

The opinion of the District Court (R. 10 to 17) is reported in 108 F. Supp. 323. The opinion of the Court of Appeals (R. 25) is not yet published in Fed. 2d.

No opinion was rendered by the Court of Appeals in denying petitioner's application for rehearing.

Jurisdiction

The judgment of the Court of Appeals was entered on June 4, 1953; thereafter petitioner filed a petition for rehearing in said Court on June 17, 1953, which said Court denied on June 19, 1953.

The jurisdiction of this Court is found in 28 U. S. Code, Secs. 1254 (1) and 2101 (c).

Questions Presented

1. Where a seaman assigned to the same quarters on shipboard as plaintiff committed unprovoked assault on plaintiff on shipboard in the quarters and during the time assigned to plaintiff for rest between watches:

(a) Whether unseaworthiness and unfitness of crew and quarters is limited to the assaulting seaman's known or obvious unfitness broadly to serve as a member of a ship's crew, or covers particularly his unfitness and failure, when assigned to the same quarters as plaintiff, and defendant's failure through him, to secure, allow and maintain to plaintiff his right to safe quarters and opportunity for rest between watches in safety from unprovoked assault by such seaman, and supported, under the findings, the District Court judgment for plaintiff herein.

(b) Whether under the *Jones Act* (46 U. S. C. Sec. 688), and *Federal Employers' Liability Act* (45 U. S. C. Secs. 51 and 54) "negligence" as covering assault is limited to negligence of officers in employing a seaman of brutal or dangerous reputation, or covers also both (i) the failure of defendant to secure to plaintiff safe quarters and opportunity for rest between watches in safety from unprovoked assault by an employee of defendant assigned to the same quarters, and (ii) the act of Hunter, an employee of defendant assigned to the same quarters as plaintiff, in

committing unprovoked assault on plaintiff in the quarters and during the time assigned to plaintiff for rest between watches.

2. Whether the District Court's determination of unseaworthiness was a finding of fact which under Rules 52, 75 and 76 of the Federal Rules of Civil Procedure, the Court of Appeals lacked authority to review or set aside or reverse, where defendant did not designate and the record did not contain and the Court of Appeals did not review the evidence or testimony or a condensed statement in narrative form of all or part thereof, nor determine therefrom that the District Court's finding of unseaworthiness was clearly erroneous, and where defendant did not serve with its designation any statement of such a point, and

3. Whether the Court of Appeals erred in refusing to notice plaintiff's cross-appeal as to negligence and inadequacy of damages and in reversing plaintiff's judgment and dismissing the complaint without consideration of plaintiff's cross-appeal.

Statutes Involved

The statutes involved are the *Jones Act* (46 U. S. C. Sec. 688) and *Federal Employers' Liability Act* (45 U. S. C. Secs. 51 and 54).

46 U. S. C. Sec. 688 provides:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply * * *"

45 U. S. C. Sec. 51 provides:

> "Every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its * * * equipment * * *"

Sec. 54 provides:

> "That in any action brought * * * by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation * * * of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Statement

Plaintiff, a seaman, 52 years old, obtained a judgment in the United States District Court, Southern District of New York (Thomas F. Murphy, D. J.) for $15,000 damages and $75 costs, for injury sustained in an assault on him on shipboard in the quarters and during the time assigned to him for rest between watches, committed by another seaman, Hunter, assigned to the same quarters.

The defendant appealed to the Court of Appeals, Second Circuit, and filed a designation (R. 20) which did not

include any of the evdience, nor any condensed statement in narrative form of all or part of the testimony, nor any statement of points, pursuant to the Federal Rules of Civil Procedure, Rule 75, paragraphs c, d and g, nor does the record contain such a statement, under Rule 76. Plaintiff cross-appealed from the dismissal of the complaint as to negligence in Conclusion of Law No. 1 and inadequacy.

The record contains the following (R. 10-17):

"FINDINGS OF FACT

"1. That plaintiff has been a seaman for 32 years and signed articles on the defendant's S. S. Frederick Lykes at Houston, Texas, for a foreign voyage to the Far East which consumed about four months' time.

"2. Aboard ship he shared quarters with two fellow seamen, including Hunter, his assailant. Through the entire course of the voyage to the Far East and return there was no trouble between plaintiff and Hunter. In fact plaintiff described their relationship as 'friendly.' There was testimony, however, that on a single occasion in the Philippines Hunter had an argument with a fellow crew member but no blows were struck by either.

"3. On the evening of the assault, May 25, 1949, when the ship had returned to Galveston, Texas, plaintiff and Hunter had a can of beer together ashore and left each other under amicable circumstances. Plaintiff returned to the ship and went to sleep since his watch did not begin until 12 midnight. He reported for duty in the fireroom of the S. S. Frederick Lykes at a few minutes before midnight. Hunter, who had the 8 to 12 watch in the same fireroom, told him everything was in order and left, presumably for his quarters.

"4. Plaintiff did not find everything in order. There were no notations on the blackboard concerning the tips in the burner and some oil had been spilled on the

deck. The ship was being maneuvered to go upstream to Houston. Plaintiff inquired of the junior engineer what size tips Hunter had used and got no satisfactory answer.

"5. A few minutes later Hunter returned to the fireroom and shouted some vile remarks at plaintiff. Hunter told plaintiff that he had been firing long enough to know where things were. This argument was broken up by the chief engineer, who told Hunter to go back to his quarters. No blows were struck—in fact there was no physical contact at all.

"6. Later that same morning after the plaintiff had completed his watch and returned to his quarters he was suddenly and without provocation beaten by Hunter. As a result plaintiff sustained severe injuries to his hip. These injuries caused plaintiff to be conveyed by ambulance that day to a hospital in Houston and from there to the Marine Hospital in Galveston.

* * *

"11. The injuries that plaintiff sustained consisted of a fracture of the neck of the right femur. A pin placed through the femur to keep that bone in place was subsequently removed. Later the shaft of the femur was broken by surgeons in order to align it better. At that time a metal plate was placed in the femur, which remains to the present. Plaintiff walks with the aid of a cane and is presently suffering pain.

* * *

"DISCUSSION

"* * * there is no evidence that the shipowner was aware of any propensity of Hunter's to assault fellow employees, either at the time Hunter was hired or at

any other time prior to the assault on the plaintiff . * * * In this case however there is no evidence of any appreciable probability of such assault by hiring or retaining Hunter. * * *

"* * * But neither the situation of a justified or sufficiently provoked intentional battery are presented by the evidence in this case. And the evidence being uncontradicted that plaintiff's injuries were intentionally caused by the blows of Hunter, a fellow seaman, the plaintiff may recover for breach of seaworthiness.

"Conclusions of Law

"1. The plaintiff has failed to prove negligence on the part of the defendant and the complaint in this regard should be dismissed.

"2. Because of the assault and battery on the plaintiff by Hunter the plaintiff is entitled to be indemnified for the defendant's breach of its warranty of seaworthiness in the sum of $15,000."

The Court of Appeals (Swan, Ch. J., L. Hand and Augustus N. Hand, Ct. JJ.) did not have before it nor review the evidence, nor consider whether nor determine therefrom that the finding of unseaworthiness was clearly erroneous under Federal Rules of Civil Procedure, Rule 52. It, nevertheless, reversed the judgment and dismissed the complaint with an opinion by L. Hand, J. on June 4, 1953. It held that "it will not be necessary to notice" plaintiff's cross-appeal.

On June 17, 1953, petitioner filed with the said Court a petition for rehearing, which was summarily denied without opinion on June 19, 1953.

Specification of Errors

The Court of Appeals erred:

1. In failing to give effect to the duty of defendant to provide and secure to plaintiff safe quarters and opportunity for rest therein in safety between watches, and to the violation of such duty through the action of defendant's employee, Hunter, in assaulting plaintiff without provocation on shipboard in the quarters and during the time assigned to plaintiff for rest.

2. In holding defendant not liable for the unprovoked assault of plaintiff by defendant's employee, Hunter, in the quarters and during the time assigned to plaintiff for rest on shipboard between watches.

3. In holding, in effect, that plaintiff assumed the risk of unprovoked assault by defendant's employee, Hunter, in the quarters and during the time assigned to plaintiff for rest on shipboard between watches.

4. In reversing the District Court's determination of unseaworthiness without having before it or considerng the evidence on which such determination was based, or determining therefrom whether such determination was clearly erroneous, and without defendant having stated any such point in its designation.

5. In holding it unnecessaary to notice plaintiff's cross-appeal, and refusing to notice, consider and determine the questions of defendant's liability for "negligence" of defendant's officers, agents and employees and inadequacy of damages presented by such cross-appeal.

Reasons for Granting the Writ*

I. Respecting unseaworthiness, the Court of Appeals, and respecting negligence, both courts have failed to give effect to plaintiff's right to and defendant's duty to provide, and its warranty of, safe quarters and opportunity for rest therein in safety between watches, and the consequent duty of Hunter, as an employee of defendant, assigned to the same quarters as plaintiff, to so conduct himself as to secure to plaintiff his right to safe quarters and opportunity for safely resting therein between watches. The decision has burdened plaintiff with assumption of the risk of unprovoked assault in such quarters by such other seaman assigned to the same quarters. This violates and conflicts with the provisions and the results or the principles of the following statutes and decisions.

(a) By statute, as by maritime law, unseaworthiness includes being "otherwise unfit in her crew, body, tackle, apparel, furniture, provisions, or stores" (46 U. S. C. Sec. 653); every vessel must have "suitable accommodations for * * * the crew * * * with safety to life" (46 U. S. C. Sec. 391); "crew quarters * * * properly ventilated and in a clean and sanitary condition" (46 U. S. C. Sec. 660a); "a space of not less than one hundred and twenty cubic feet and not less than sixteen square feet, measured on the floor or deck of that place, for each seaman or apprentice lodged therein, and each seaman shall have a separate berth * * *; such place or lodging shall be securely constructed, properly lighted, drained, heated, and ventilated, properly protected from weather and sea, and, as far as practicable, properly shut off and protected from the effluvium of cargo or bilge water" (46 U. S. C. Sec. 660-1); "space allotment for lodgings" (*Idem.*); "a safe and warm

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* This summary of reasons is submitted also as petitioner's brief or argument.

room for the use of seamen in cold weather" (46 U. S. C. Sec. 669); and "firemen * * * divided into at least three watches, which shall be kept on duty successively" (46 U. S. C. Sec. 673).

In *Aguilar* v. *Standard Oil Co. of N. J.*, 318 U. S. 724, 728, 729, 731-732, 734, this Court held that these statutory provisions, "designed to secure the comfort and health of seamen aboard ship" and "recognizing the shipowner's duty * * * do not create the duty. That existed long before the statutes were adopted. They merely recognize the pre-existing obligation and put specific legal sanctions, generally criminal, behind it * * * The legislation therefore gives no ground for making inferences adverse to the seaman or restrictive of his rights * * * Rather it furnishes the strongest basis for regarding them broadly, when an issue concerning their scope arises * * * Unlike men employed in service on land, the seaman, when he finishes his day's work, is neither relieved of obligations to his employer nor wholly free to dispose of his leisure as he sees fit. Of necessity, during the voyage he must eat, drink, lodge and divert himself within the confines of the ship. In short, during the period of his tenure the vessel is not merely his place of employment, it is the framework of his existence * * * In sum, it is the ship's business which subjects the seaman to the risks attending hours of relaxation in strange surroundings. Accordingly it is but reasonable that the business extend the same protections against injury from them as it gives for other risks of the employment" (318 U. S. 728, 729, 731-732, 734).

(b) In respect to these duties fellow-seamen are not fellow-servants, but each is the agent of the owner, who is liable for their violations of a duty of the owner (*Scarff* v. *Metcalf, et al.*, 107 N. Y. 211); such duty being "imposed by the law itself as one annexed to the employment" (*Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 371), and being "non-delegable and not qualified by the fellow-servant rule" (*Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, 102).

(c) Provision and maintenance as a part of the owner's warranty and duty are not limited to maintenance and cure after injury; for, as this Court has pointed out, under both the maritime law and the *Jones Act* (46 U. S. C. Sec. 688) and *Employers' Liability Act* (45 U. S. C. Sec. 51) a shipowner would be liable for damages, for example, in "the case of a seaman who is starved during the voyage in disregard of the duty of maintenance with the result that his health is permanently impaired" (*Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 373), or if unwholesome food is served aboard ship, causing injury to a seaman (*U. S. S. B. E. F. C.* v. *Greenwald*, 2 Cir., 16 F. 2d 948).

Specifically as to quarters and right of safe relaxation and rest, a shipowner has been held liable under the *Jones* Act (46 U. S. C. Sec. 688) and *Employers' Liability Act* (45 U. S. C. Secs. 51, 54)—and it would seem would be equally liable under the maritime law—for damages for assault by another member of the crew on plaintiff in the quarters assigned to him on shipboard (*Boudoin* v. *Lykes Bros. S. S. Co.*, E. D. La., 112 F. Supp. 177, 180); for tuberculosis contracted "while occupying the sleeping quarters provided for him on board ship" due to their dampness and improper ventilation (*McCall* v. *Inter Harbor Navigation Co.*, 154 Or. 252, 258) or through the failure to provide "safe" quarters aboard ship, due to a leaky valve of a radiator spraying dampness on a seaman's berth (*Rooker* v. *Alaska S. S. Co.*, 185 Wash. 71, cert. denied 299 U. S. 552); and for contagious itch contracted by a seaman aboard ship from another member of the crew (*Compton* v. *Hammond Lumber Co.*, 153 Or. 546, 555). The Ninth Circuit in *Sundberg* v. *Washington Fish & Oyster Co.*, 9 Cir., 138 F. 2d 801, held that the issue as to plaintiff's claim for damages was for the jury and the complaint had been erroneously dismissed where plaintiff, while off duty was injured by a bullet fired by another member of the crew at sea lions for sport. In *The Lord Derby*, E. D. La., 17 Fed. 265, Judge Pardee in 1883 held a vessel liable in rem for damages where a

pilot was bitten by a dog chained under the cabin table "because the cabin was the place where the libellant had been assigned to sleep, had slept, where his baggage was placed, and where he had a right to go and did go for it" (17 Fed. 266).

The decision herein thus conflicts in principle with each of the foregoing decisions.

(d) In *Lillie* v. *Thompson*, 332 U. S. 459, this Court, per curiam, reversed dismissal and sustained a complaint against a railroad where a criminal assault was committed by a stranger on a woman employed by defendant as a night depot agent, because there was "a duty to make reasonable provision against it" and "Breach of that duty would be negligence, and we cannot say as a matter of law that petitioner's injury did not result at least in part from such negligence" (332 U. S. 462). And where an employee, charged with any part of the duty to provide safe quarters, himself commits the assault, his act in violation of such duty is further independent ground for liability. *Boudoin* v. *Lykes Bros. S. S. Co.*, E. D. La., 112 F. Supp. 177, 178, where a seaman was assaulted in his bed by another seaman. Compare *Compagnie Generale Transatlantique* v. *Rivers*, 2 Cir., 211 Fed. 294, cert. denied 232 U. S. 727, holding a steamship company liable for assault by a member of the crew upon a passenger in the quarters assigned to her aboard ship.

(e) The 1939 amendment to the *Employers' Liability Act* (53 Stat. 1404, c. 685, 45 U. S. C. Sec. 54) obliterated from the law every vestige of the doctrine of assumption of risk (*Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 58). This applies to seamen under the *Jones Act*, and "Thus the shipowner becomes liable for injuries to a seaman resulting in whole or in part from the negligence of another employee", as unqualifiedly and completely as for negligence of an officer or agent of defendant. "While the acts

of negligence underlying such accidents may reach higher into the management hierarchy, the Federal Employers' Liability Act compels us to go no higher than a fellow servant" (*Johnson* v. *U. S.*, 333 U. S. 46, 49).

The decision herein conflicts with this Court's interpretation of the statutes in the *Tiller* and *Johnson* cases, for the Court of Appeals refused even to consider defendant's liability for the acts of Hunter and thus burdened plaintiff with assumption of the full risk of unprovoked assault by Hunter in the quarters assigned to plaintiff for rest.

(f) In *Reck* v. *Pacific-Atlantic S. S. Co.*, 2 Cir., 180 F. 2d. 866, the Court affirmed a judgment for $46,000 damages and $1,836 maintenance and cure where a seaman, suffering from delirium tremens two days after leaving port due to severe alcoholic intoxication while in port, and put to bed in his quarters aboard ship, got up and left his quarters and fell into an open hatch when Tackett, another crew member assigned to guard him, thought him asleep and left him unguarded about five minutes while going to the lavatory fifteen feet away. The Court pointed out that "the watch was then changing and Tackett could have obtained relief for a moment" (180 F. 2d 868). In *McDonough* v. *Buckeye S. S. Co., D. C. N. D. Ohio,* 103 F. Supp. 473, affd. *Buckeye Steamship Company* v. *McDonough,* 6 Cir., 200 F. 2d 558, cert. denied 345 U. S. 926, the Courts gave plaintiff judgment for death of Kerr, a seaman who, while drunk, was left briefly on a dock eighteen feet wide where he fell and could not be lifted by Cox, a seaman assigned to assist him to the ship, and drowned while Cox went aboard ship and reported. It was held that "* * * the conclusion is inescapable that Cox disregarded his duty and failed to act as a reasonable man of ordinary prudence" (103 F. Supp. 477).

In light of the *Reck* and *McDonough* cases, the decision herein means that while the company through its employees

owes a duty to a drunk, no duty is owed to a sober seaman who has just come off watch, and he assumes the risk of being assaulted and crippled for life in the quarters assigned to him for rest, committed without provocation by a seaman assigned to share the same quarters.

(g) But here, with Hunter assigned to share quarters with plaintiff—and when told by the chief engineer to go back to his quarters, where he then awaited and assaulted plaintiff (R. 11)—Hunter was charged with and violated duty as defendant's employee, indeed the very duty of defendant, to allow and secure to plaintiff safe enjoyment of such quarters and the opportunity to rest therein in safety upon coming off watch; duty as positive as were the duties of Tackett, Cox, Varner and Lamure, violated in the *Reck* (180 F. 2d 866), *McDonough* (103 F. Supp. 473, affd. 200 F. 2d 558), *Sundberg* (138 F. 2d 801) and *Rivers* (211 Fed. 294) cases supra. "He was the representative of principal duties of the defendant" (*Brown* v. *Pacific Coal Co.*, 241 U. S. 571, 573).

It was the act of the junior engineer in communicating with Hunter which had aroused Hunter; then in the engine room plaintiff enjoyed protection from the chief engineer (R. 11, pars. 4 and 5); but in the quarters assigned to him and Hunter, as the findings indicate, he could look only to Hunter for safety, and was helpless when Hunter, in violation of duty, assaulted him (R. pp. 10, 11, pars. 2 and 6).

(h) *Jamison* v. *Encarnacion*, 281 U. S. 635 and *Alpha Steamship Corporation* v. *Cain*, 281 U. S. 642 establish that, given a duty, its violation by assault is equally "negligence" as is a violation of duty by any less willful act or default, this Court saying:

> "As unquestionably the employer would be liable if plaintiff's injuries had been caused by mere inadvertence or carelessness on the part of the offending foreman, it would be unreasonable and in conflict with

the purpose of Congress to hold that the assault, a much graver breach of duty, was not negligence within the meaning of the Act" (281 U. S. 641).

This definition of negligence as including assault is as applicable to the assault by Hunter here as to that by the foreman in the *Jamison* case, because defendant's duty here was owed through Hunter as fully as through the foreman in the *Jamison* case.

(i) The Second Circuit Court of Appeals itself reversed a dismissal in *Nelson* v. *American-West African Line*, 2 Cir., 86 F. 2d 730, cert. denied 300 U. S. 665, where a boatswain entered the crew's quarters and assaulted a seaman in his bunk; affirmed recoveries in *Koehler* v. *Presque-Isle Transp. Co.*, 2 Cir., 141 F. 2d 490, where a fellow-seaman Todd assaulted plaintiff on the ladder and then on deck when plaintiff was returning from shore leave, and in *Kyriakos* v. *Goulandris*, 2 Cir., 151 F. 2d 132, where a fellow seaman Bouritis assaulted plaintiff about a mile from the ship while plaintiff was returning from shore leave; and reversed a dismissal in *Keen* v. *Overseas Tankship Corp.*, 2 Cir., 194 F. 2d 515, cert. denied 343 U. S. 966, where a fellow-seaman Mruczinski assaulted plaintiff on deck when they had just returned from shore leave. In *Koehler*, the Court (Frank, J. writing) said of "negligence" that "We think that it includes any knowing or careless breach of any obligation which the employer owes to the seamen. Among those obligations is that of seeing to the safety of the crew" (141 F. 2d 491). In *Kyriakos*, noting that "Bouritis was hidden behind the corner of a building * * * to ambush the libellant," the Court (Augustus N. Hand, J., writing) pointed out that "Seamen have no legal power to rid themselves of dangerous shipmates" (151 F. 2d 135).

The *Nelson*, *Koehler* and *Kyriakos* cases, correct in rsult, conflict in result with the case at bar.

(j) But the *Nelson*, *Koehler* and *Kyriakos* cases contain erroneous reasoning or theme, and the Court of Appeals purportedly gives effect herein to the erroneous reasoning instead of the correct result of these cases, in refusing to follow their result to sustain the recovery herein. This "confusion which has developed in the application of the two statutes" (*Carter* v. *Atlantic & Saint Andrews Bay Ry. Co.*, 338 U. S. 430, 431) in assault cases makes doubly important a review to clarify and determine in the case at bar the points really justifying recovery. Thus, in *Nelson*, although the assault of Nelson in his bunk during rest between watches clearly established a violation by the boatswain of defendant's duty to secure to Nelson safe quarters and opportunity for rest in safety between watches,—and the Court itself stated that "In truth it was at best an act of wanton tyranny to get him out of his bunk at that time, to say nothing of the violence used in effecting it"—the Court nevertheless erroneously said of the boatswain's assault that "unless there was some evidence that he supposed himself engaged upon the ship's business the ship was not liable" (86 F. 2d 732). And although the Court stated that "the boatswain was blind drunk, and through his clouded mind all sorts of vague ideas may have been passing; the fact that he had made himself incompetent to further the ship's business was immaterial", the Court seized upon the bare fact that "he told him not only to get up, but to 'turn to' " as being "some evidence that he meant to act for the ship." The Court then states the astounding doctrine that, "however imbecile his conduct", the boatswain's drunken use of these two words "turn to" spelt the difference between liability of defendant or assumption by Nelson of the risk of assault in his bunk;—that the same assault, in identical detail except lacking use by a drunk of the words "turn to", would have required that Nelson bear the risk and the injury, and that the company be held not liable.

This reasoning in the *Nelson* case, and that herein, ignores the violation of the duty to provide safe quar-

ters and opportunity for rest in safety between watches, and also is in conflict with *Boudoin* v. *Lykes Bros. S. S. Co.*, E. D. La., 112 F. Supp. 177, a District Court decision in the Fifth Circuit, and in conflict with this Court's definition of negligence in the *Jamison* and *Cain* cases, and assumption of risk rulings in the *Tiller* and *Johnson* cases.

Then, in *Kable* v. *United States*, 2 Cir., 169 F. 2d 90, where the chief officer was assaulted by the chief engineer, the Second Circuit, holding the defendant not liable, stated it distinguished the *Nelson, Cain* and *Jamison* cases as having "no application here, for in each the assault was committed by a superior officer on an immediate inferior" and were "directly related to the doing of the ship's work" (169 F. 2d 92). The *Koehler* (141 F. 2d 490), *Kyriakos* (151 F. 2d 132) and *Keen* (194 F. 2d 515) cases, though correctly sustaining liability for assault by a fellow-seaman, ignore as the basis of liability the assaulting seaman's violation of duty, and emphasize rather only the negligence of "officers" in hiring or retaining dangerous men (141 F. 2d 491; 151 F. 2d 135; 194 F. 2d 516) and consequent unseaworthiness (194 F. 2d 518).

This particular aspect of the *Nelson, Kable, Koehler, Kyriakos* and *Keen* decisions of the Second Circuit, of course, is directly contrary to this Court's holding in *Johnson* v. *United States*, 333 U. S. 46, 49, that the Act "compels us to go no higher than a fellow servant."

But following this particular theme of its own assault decisions, rather than their results and the doctrine of this Court's decisions, the Court of Appeals now holds herein that "every workman is apt to be angry when a fellow complains of his work to their common superior; * * * Sailors lead a rough life and are more apt to use their fists than office employees; * * * when a man's blood is up,*

* There is no finding that plaintiff "complained"; but to whom should he complain if not to an officer? It was the junior engineer who got Hunter's "blood up."

he will go farther than he should; * * * Such a set-to seldom results in serious injury when only fists are used, * * * We are not satisfied that the findings proved that Hunter was a man unfit to serve." This is the language of assumption of risk,* now completely obliterated from the law. Moreover, the negligent servants were not held unfit to serve but to have violated duty in *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, *Johnson* v. *U. S.*, 333 U. S. 46, and *Anderson* v. *Atchison, Topeka and Santa Fe Ry. Co.*, 333 U. S. 821. Tackett, Cox and Varner were not unfit to serve but violated duty in the *Reck* (180 F. 2d 866), *McDonough* (103 F. Supp. 473, affd. 200 F. 2d 558) and *Sundberg* (138 F. 2d 801) cases. Seldom would Tackett's going to the lavatory, or Cox's briefly leaving a man he could not carry or Varner's shooting at sea lions cause injury or death as in the *Reck, McDonough* and *Sundberg* cases.

(k) The decision herein, if allowed to stand, will mean, in its effect, that in assault cases the word "employee" is to be ignored or excised from both the liability and assumption of risk sections of the *Federal Employers' Liability Act* (45 U. S. C. Secs. 51 and 54), as incorporated in the *Jones Act* (46 U. S. C. Sec. 688); that despite the use in the statute of the word "employees" equally with "officers", a seaman assumes the risk of any assault not committed by an "officer" or not due to an "officer's" negligence in hiring an unfit man, and that the seaman assumes the risk of quarters made unsafe by conduct of a fellow seaman assigned to share the quarters. The conflict and confusion require review (Cf. *Carter* v. *Atlanta & Saint Andrews Bay Ry. Co.*, 338 U. S. 430, 431); the decision is too important not to review, too erroneous not to reverse.

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* Compare for similarity of reasoning and ruling *Baltimore & Ohio RR. Co.* v. *Baugh*, 149 U. S. 368, decided in 1893; fifteen years before enactment of the Employers' Liability Act and twenty-seven years before the Jones Act.

II. The reversal of the determination of unseaworthiness, on the record herein, violates Fed. Rules of Civ. Proc., Rules 52, 75 and 76, and conflicts with the following decisions of this Court and the highest judicial authority of England which have consistently held that the issue of unseaworthiness is an issue of fact, and the determination by Court or jury of unseaworthiness (or seaworthiness) is a finding of fact (*Mahnich* v. *Southern Steamship Co.*, 321 U. S. 96, 98; *Luckenbach* v. *W. J. McCahan Sugar Refining Co.*, 248 U. S. 139, 145; *W. J. McCahan Sugar Refining Co.* v. *S. S. Wildcroft*, 201 U. S. 378, 387; *The Carib Prince*, 170 U. S. 655, 658; *Steel* v. *State Line S. S. Co.*, L. R. 3 App. cas. 72, 81, 82, 84, 86, 90, 91).

The single defective rivet in the peak tank in *The Carib Prince*, and the insecurely latched port in *Steel* v. *State Line S. S. Co.*, would have been immaterial with cargoes of marble or teakwood but supported fact finding of unseaworthiness with the cargoes of bitters and wheat. *Mahnich* v. *Southern Steamship Co.* states unseaworthiness includes being—even due to the act of a fellow servant—"inadequate for the purpose for which it was ordinarily used" (321 U. S. 103, 104). The argument of availability of good rope was inappropriate "because * * * it was the stage which was unseaworthy" (321 U. S. 104). See also *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255. Unseaworthiness is relative to the facts and evidence of each case.

Here, the condition—the "seaworthiness" or "unseaworthiness"—of the quarters assigned to plaintiff, included the assignment of Hunter to share such quarters. In turn, the fitness or "seaworthiness" or "unseaworthiness" of Hunter included not merely his qualifications or fitness as a member of a crew, but his fitness as a part of the quarters assigned to plaintiff. As with negligence (*Johnson* v. *United States*, 355 U. S. 46, 48), so, we submit, with unseaworthiness (Cf. *Carlisle Packing Co.* v.

Sandanger, supra) res ipsa loquitur applies in determining this factual issue; the question whether the injury was "in fact the result of causes beyond the defendant's responsibility" was a factual question (*Gleeson* v. *Virginia Midland R. R. Co.*, 140 U. S. 435, 444; *Terminal R. Assn. of St. Louis* v. *Stangel*, 8 Cir., 122 F. 2d 271, 276, cert. denied 314 U. S. 680, cited in *Johnson* v. *United States*); and all the evidence was involved in its determination.

The District Court's judgment for plaintiff was based upon its determination of unseaworthiness from "the evidence in this case" (R. 16, fol. 48). The Court of Appeals, however, did not have before it "the evidence in this case"; it had only the District Court's decision containing findings and conclusions. Under Federal Rules of Civil Procedure, Rules 75 and 76, defendant in appealing did not designate any part of the evidence, nor a condensed statement in narrative form of all or part of the testimony, nor a statement of points (Rule 75, pars. (c), (d) and (g)), nor does the record contain such a statement (Rule 76). If defendant intended contesting the factual determination of unseaworthiness, plaintiff was entitled to notice of this, and to the right to have the evidence included.

Defendant thus was in no position to contend that, and the Court of Appeals had nothing from which it could consider whether, the determination of unseaworthiness as a finding of fact was clearly erroneous. Under Rule 52 "Findings of fact shall not be set aside unless clearly erroneous." This is to be determined "on the entire evidence" (*United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395). See also 5 *Moore's Federal Practice*, 2d Ed., pages 2611-2629 and cases cited. The Court of Appeals did not consider the evidence nor purport to determine therefrom that the finding was "clearly erroneous."

Its decision thus conflicts with the foregoing decisions and violates the foregoing rules; and the question is a most important one affecting appeals from judgments in personal injury actions (Cf. *United States* v. *Gypsum Co.*, 333 U. S. 364).

III. The District Court's ruling as to negligence, however, was solely as a conclusion of law (R. 17), based upon no showing that the shipowner was aware of any propensity of Hunter's to assault fellow employees (R. 13). But this ignored as matter of law the theory of plaintiff's case. Contrary to *Johnson* v. *United States*, 333 U. S. 46, 49, both Courts herein, as matter of law, have looked only "higher than a fellow servant."

Both Courts also have ignored the fact that both the Chief Engineer and junior engineer were aware of (and apparently occasioned) Hunter's wrath and his attempted assault of plaintiff in the engine room.

Contrary to the authorities noted under I, *supra*, both Courts have ignored also the non-delegable duty of defendant to provide plaintiff safe quarters and opportunity to rest in safety between watches.

The findings as to unseaworthiness equally establish "negligence" in these respects sufficient to support the District Court's judgment on this ground as distinct from the bare ground of "unseaworthiness" (*Alpha Steamship Corporation* v. *Cain*, 281 U. S. 642; *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255). Plaintiff cross-appealed to present these questions, as well as the inadequacy of damages. It consequently was error—indeed, a denial of due proces of law—for the Court of Appeals to hold that "it will not be necessary to notice his appeal." This itself is so important as to require review (Cf. *Alpha Steamship Corporation* v. *Cain; Carlisle Packing Co.* v. *Sandanger, supra; Buzynski* v. *Luckenbach Steamship Co.*, 277 U. S. 226).

CONCLUSION

The decision of the Court below involves questions of the greatest importance to seamen, upon which the Court of Appeals clearly erred; questions of the greatest importance respecting appellate practice, upon which said Court also clearly erred; and impressive conflict upon all questions with decisions of this and other high Courts; and a writ of certiorari should be granted and the case should be reviewed and reversed by this Court.

Dated, New York, N. Y., July 31, 1953.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1953

No. 257

HENRY J. JONES,

Petitioner,

—vs.—

LYKES BROS. STEAMSHIP CO. INC.,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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October Term, 1953

No. 257

HENRY J. JONES,

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—v.—

LYKES BROS. STEAMSHIP CO. INC.,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI

This case presents the following questions:

1. Is a shipowner liable for every assault committed by one seaman upon a fellow seaman?
2. Is a seaman a vicious character simply because he has committed an assault upon a fellow seaman?

The Petitioner, a fireman/watertender on the SS FREDERICK LYKES, was assaulted by another fireman/watertender on the same vessel. The assault occurred in the quarters occupied by the two men when they were both off duty.

The District Court found—(1) that there was no negligence on the part of the Respondent, and (2) that Hunter, the seaman committing the assault, was a vicious character simply because he in fact committed the assault. The Court said:

Rec. 13, fols. 37, 38:

> "• • • There is no evidence that the shipowner was aware of any propensity of Hunter's to assault fellow employees, either at the time Hunter was hired or at any other time prior to the assault on the plaintiff. • • • Consequently, in the absence of an awareness by defendant of vicious tendencies in their employee and the absence of any evidence which would cause a reasonable man of ordinary prudence to investigate further for such tendencies, there cannot be said to be 'negligence imputable to an employer' under the Jones Act (41 Stat. 1007, 46 U. S. C. A. Sec. 688 et seq.)."

The Petitioner did not question this finding in the Court of Appeals and does not question it here. The Petitioner contends that a shipowner is liable for every assault committed upon a seaman by a fellow seaman. That proposition has no support in any reported case.

The District Court found that the assault committed upon the Petitioner by Hunter was intentional and upon that finding held the seaman committing the assault a vicious character and the vessel unseaworthy. The Court said:

Rec. 16, fols. 46, 47:

> "In the *Keen* case, supra, 194 F. 2d at page 518, the Court said:

'Applied to a seaman, such a warranty is, not that a seaman is competent to meet all contingencies; but that he is equal in disposition and seamanship to the ordinary men in the calling'. * * *

Fol. 48:

And the evidence being uncontradicted that plaintiff's injuries were intentionally caused by the blows of Hunter, a fellow seaman, the plaintiff may recover for breach of seaworthiness."

The Court of Appeals which decided the *Keen* case was the same Court which heard this case. The opinions in both cases were written by Judge Learned Hand. The Court of Appeals said:

"We held very recently that the warranty of seaworthiness of the ship to the crew included their individual 'disposition and seamanship'; but we cannot agree that the situation at bar is within this doctrine, else it would follow that a ship owner is liable for any injuries resulting from every sailors' brawl. * * * Sailors lead a rough life and are more apt to use their fists than office employees; what will seem to sedentary and protected persons an insufficient provocation for a personal encounter, is not the measure of the 'disposition' of 'the ordinary men in the calling'. It is true that Hunter continued to strike—'pound'—the plaintiff after he was down; but when a man's blood is up, he will go farther than he should; and Hunter later relented and showed some contrition. Such a set-to seldom results in serious injury, when only fists are used, and we are to judge Hunter's disposition, not by the fact that the plaintiff broke his hip, but by what would ordinarily follow from what he did.

"In other decisions of this sort the assault has been either with a weapon, or the assailant has been independently shown to have been exceptionally quarrelsome, or worse. Thus in *Keen* v. *Overseas Tankship Co.*, supra (194 Fed. (2) 515), he savagely attacked the plaintiff with a meat cleaver; in *Kyriakos* v. *Goulandris*, 151 Fed. (2) 132, 135 (C. A. 2) he was proved to have been 'of such savage and uncontrolled disposition, and so easily provoked, as to be a danger to men who worked on the same ship,' and he had already 'assaulted more than one man.' In *The Rolph*, 299 Fed. Rep. 52, 55 (C. A. 9) the mate was a man 'known to give vent to a wicked disposition by violent, cruel, and uncalled for assaults upon sailors.' In *Koehler* v. *Presque-Isle Transportation Co.*, 141 Fed. (2) 490 (C.A. 2), the jury found by special verdict that the assailant was 'of a vicious and belligerent nature likely to inflict bodily harm upon other members of the crew.' We are not satisfied that the findings proved that Hunter was a man unfit to serve, judged by the usual standards of the calling.

Judgment reversed; complaint dismissed, without costs."

The decision of the Court of Appeals is not in conflict with any decision of any other Court of Appeals, or with any decision of a State Court or with any decision of this Court. It is in accordance with the decisions of this Court and all of the lower Courts.

ARGUMENT

POINT I

There is no question of negligence involved in this case.

The District Court found that there was no negligence on the part of the defendant (Rec. 13, fols. 37, 38) and in his Conclusions of Law held:

Rec. 17, fol. 49:

> 1. The plaintiff has failed to prove negligence on the part of the defendant and the complaint in this regard should be dismissed.

That finding and that conclusion were not disturbed by the Court of Appeals and are not seriously challenged in the petition.

The position taken by the Petitioner that a shipowner is liable for every assault committed by one seaman upon a fellow seaman is not supported by any reported decision of this Court or any of the lower Federal Courts or of any State Court.

In *Jamison* v. *Incarnacion*, 281 U. S. 635, 74 L. ed. 1082 a shipowner was held liable for an assault committed by a foreman upon a person under his jurisdiction to secure the enforcement of an order given to the subordinate by the foreman. In that case this Court said:

> "While the assault of which plaintiff complains was in excess of the authority conferred by the employer upon the foreman, it was committed in the course

> of the discharge of his duties and in furtherance of the work of the employer's business."

In *Lykes Bros. S.S. Co.* v. *Grubaugh,* 128 Fed. (2) 387, the Court of Appeals for the 5th Circuit held:

> "The law governing the responsibility of the master for an injury from a beating administered by one employee to another, as well stated in Medlin Milling Co. v. Boutwell, 104 Tex. 87, 133 S. W. 1042, 34 L. R. A., N. S., 109, and Davis v. Green, 260 U. S. 349, 43 S. Ct. 123, 67 L. Ed. 299, is that under the doctrine of respondeat superior there is no liability for a wrongful assault committed by one employee on another unless the assault is committed, whether wisely or unwisely, in furtherance of or in an attempt to further the master's business or in other words in connection with some act which an assaulter is authorized to do for the master. In any case where the act is merely a wanton and wilful act done to satisfy the temper or spite of the employee, the master is not liable."

In *Kable* v. *United States,* 169 Fed. 2d 90, the chief engineer assaulted the chief officer. The shipowner was held not liable in that case. The Court said:

> "As we have seen, the only cases holding the shipowner liable for negligence in assaults of this kind involved incidents where a superior officer assaulted an inferior in the prosecution of the ship's work. Indeed, there is some authority that the principle does not apply where the person committing the assault had no authority over the one injured. *Lykes Bros. S.S. Co.* v. *Grubaugh* (5 Cir.), 1942 A. M. C. 1305, 128 F. (2d) 387, modified 1942 A. M. C. 1314, 130 F. (2d) 25; *Nowery* v. *Smith* (E. D. Pa.), 1946 A. M. C. 1702, 69 F. Supp. 755,

affirmed (3 Cir.), 1947 A. M. C. 756, 161 F. (2d) 732. So we affirm the holding below dismissing the claim for the personal injuries sustained by libellant."

In *Brailas* v. *Shepard Steamship Company,* 152 Fed. 2d 849 the Court said:

"It is well established that a master will not be liable for the negligent acts of his servant unless they are performed in the course of or in furtherance of the master's business; the fact that the injury is done during the continuance of employment is not enough."

In *Davis* v. *Green,* 260 U. S. 349, 67 L. Ed. 299, an engineer killed a conductor. The State Court held the railway company liable on the ground that it negligently employed a dangerous man and had notice of his characteristics and that the killing occurred in the course of the engineer's employment. Mr. Justice Holmes said:

"But neither allegations nor proof present the killing as done to further the master's business, or as anything but a wanton and wilful act, done to satisfy the temper or spite of the engineer. Whatever may be the law of Mississippi, a railroad company is not liable for such an act under the statutes of the United States. The only sense in which the engineer was acting in the course of his employment was that he had received an order from Green which it was his duty to obey—in other words, that he did a wilful act wholly outside the scope of his employment, while his employment was going on."

None of the cases cited by the Petitioner sustain his position.

Aguilar v. *Standard Oil Co. of N. J.*, 318 U. S. 724, involved only the question of maintenance and cure.

In *Lille* v. *Thompson*, 332 U. S. 459, a woman employee was working alone in a building on the land of the defendant. The question there was whether there was a duty on the part of the defendant to provide her with protection at night. Under the circumstances in that case, it would seem to have no application to a seaman on board a ship.

In *Boudoin* v. *Lykes Bros. S.S. Co. Inc.*, E. D. La. 112 F. Supp. 177, 180 the court held that a drinking party had been going on on board the ship of which the master had knowledge, and held it was his duty to take steps to break up this party and to prevent a brawl such as took place.

POINT II

The ruling of the Court of Appeals that there was no unseaworthiness is correct.

The District Court held that an intentional assault upon the Petitioner by Hunter made Hunter a vicious character and the vessel unseaworthy and the owner liable.

The Court of Appeals in reversing said:

> "We held very recently that the warranty of seaworthiness of the ship to the crew included their individual 'disposition and seamanship' but we cannot agree that the situation at bar is within this doctrine, else it would follow that a shipowner is liable for any injuries resulting from every sailors' brawl."

The Court went on to say that the mere fact that a seaman assaults a fellow seaman with his fists is not sufficient to make him a vicious character. The Court of Appeals did not reverse any Finding of Fact of the District Court. It only disagreed with the District Court in the conclusions drawn from the Findings of Fact made.

It is respectfully submitted that the petition for a writ of certiorari should be denied because the decision of the Court of Appeals is not in conflict with (a) any decisions of this Court; (b) any decisions of any other Court of Appeals; (c) any State Courts, and (d) it is in accordance with all of the reported decisions on the subject.

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